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No. 10-557

Supreme Court, U.S.
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In The

Supreme Court of the United States

WAEL MOHAMED ABDEL-LATIF,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit erred in defining the term "persecution," as used in 8 U.S.C. § 1101(a)(42)(A), to mean harm or suffering done to punish an individual for a belief or characteristic which the persecutor seeks to overcome.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in treating Petitioner Abdel-Latif's request for withholding of removal relief as a subset of the proof needed to prove his entitlement to relief under the Convention Against Torture.

LIST OF PARTIES

The name of the Petitioner is:

Wael Mohamed Abdel-Latif

The name of the Respondent is:

Eric H. Holder, Jr., U.S. Attorney General

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Wael Mohamed Abdel-Latif, petitions the Court for a Writ of Certiorari to review a final judgment of the United States Court of Appeals for the Fifth Circuit (entered on July 26, 2010) which affirmed the Board of Immigration Appeals ("BIA") decision and denied his Petition for Review.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Davis, Smith, and Southwick, JJ.) is not reported and is included in the Appendix at App. 1. The final decision of the Board of Immigration Appeals ("BIA") is also not reported and is reproduced in the Appendix at App. 5.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 2010. *See* App. 3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. § 1101(a)(42)(A):

   The term "refugee" means:

   (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . . .

2. 8 U.S.C. § 1231(b)(3)(A):

   Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

3. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, implemented in the United States by the Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, Div. G, Tit. XXII, § 2242, 112 Stat. 2681,

2681-761, 2681-822 (codified as a note to 8 U.S.C. § 1231).

STATEMENT OF THE CASE

The United States Court of Appeals for the Fifth Circuit overruled Petitioner's Abdel-Latif's complaint on appeal that the Board of Immigration Affairs ("BIA") erred in adopting the Immigration Judge's ("IJ's") definition of "persecution" with respect to Abdel-Latif's withholding of removal claim. It also upheld the BIA's denial of relief as to Abdel-Latif's Convention Against Torture claim. The evidence relied on by the BIA established that Abdel-Latif, a past member of the Muslim Brotherhood, was detained, continually beaten, and threatened for a 12-14 hour period by SSI officers (a police force of the Egyptian Government) because of his participation in a rally on the Alexandria college campus organized by the Muslim Brotherhood. The Muslim Brotherhood is a peaceful, political organization which has for many years been outlawed by the Egyptian Government. The BIA adopted the IJ's interpretation of the term "persecution," as used in the definition of "refugee" codified by § 101(a)(42) of the Immigration & Nationality Act ("INA") (8 U.S.C. § 1101(a)(42)(A)). The IJ defined "persecution" in the following manner:

> The first question which concerns the question [sic] is whether or not the respondent in fact suffered persecution. Actions can be persecution if the harm or suffering was done to

> punish an individual for a belief or characteristic which the persecutor seeks to overcome. *Matter of Acosta*, 19 I & N Dec. 211, 223 (BIA 1985). *Admin. Rec. 70-71.*
>
> . . .
>
> The testimony and the exhibits are simply insufficient to reflect that the single arrest of this respondent was persecution designed or intended by the persecutor to overcome any characteristic or belief, political or otherwise. *Admin. Rec. 72.*

In affirming the correctness of the IJ's definition of "persecution," the Fifth Circuit ignored Abdel-Latif's complaint on appeal that the BIA erred in adopting the IJ's definition of "persecution." The Fifth Circuit instead cited to its earlier decision in *Roy v. Ashcroft*, 389 F.3d 132, 138 (5th Cir. 2004) for the definition it was relying on, which in turn cited to its earlier decision in *Faddoul v. INS*, 37 F.3d 185, 188 (5th Cir. 1994). In *Roy v. Ashcroft*, the Fifth Circuit stated: "Persecution has been construed as requiring a showing that 'harm or suffering will be inflicted upon [him] in order to punish [him] for possession of a belief or characteristic a persecutor sought to overcome.'" *Id.*, at 138. In *Faddoul v. INS*, the Fifth Circuit defined the term the same way: "While the INA does not provide a precise definition of persecution, we have construed the term as requiring 'a showing by the alien that "harm or suffering will be inflicted upon [her] in order to punish [her] for possessing a

belief or characteristic a persecutor sought to overcome."'" *Id.*, at 188.

The Fifth Circuit adopted this definition from dicta found in the BIA decision in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1985).[1] There, the BIA defined "persecution" to mean "either a threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive." *Id.*, at 222. However, the BIA then went on to expound upon this definition through dicta in the next paragraph of its written decision by stating: "Two significant aspects of this accepted construction of the term were as follows: First, harm or suffering had to be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor sought to overcome. . . ." *Id.*, at 222-223. The Fifth Circuit thus erred in adopting a "persecution" definition based on the dicta portion of the BIA decision in *Matter of Acosta*, rather than relying on the definition the BIA actually provided in that decision.

By citing to *Roy v. Ashcroft*, *supra*, the Fifth Circuit rejected Abdel-Latif's contention on appeal that the BIA improperly relied on its decision in

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[1] In *Faddoul*, *supra*, the Fifth Circuit cited to *Guevara Flores v. INS*, 786 F.2d 1242, 1249 (5th Cir. 1986) as the case upon which its definition of "persecution" was based. The *Guevara* case in turn cites to *Matter of Acosta*, BIA Interim Decision No. 2986, 1985 WL 56042 (March 1, 1985) as its authority for defining the term "persecution" in the manner in which the *Roy* and *Faddoul* cases defined the term.

Matter of Acosta in formulating its "persecution" definition. It also did not squarely address Abdel-Latif's argument in his appeal brief that the definition of "persecution" which should have been used was the definition of "persecution" the Fifth Circuit had previously adopted in *Abdel-Masieh v. INS*, 73 F.3d 579, 583-84 (5th Cir. 1996), to wit:

> The infliction of suffering or harm, under government sanction, upon persons who differ in a way regarded as offensive (e.g., race, religion, political opinion, etc.), in a manner condemned by civilized governments. The harm or suffering need not be physical, but may take other forms, such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life. *Abdel-Masieh, supra,* at 583-84 (5th Cir. 1996)

The Fifth Circuit further ruled that Abdel-Latif was not entitled to relief under the CAT (Convention Against Torture) because he had failed to demonstrate his entitlement to withholding of removal relief. (*See* App. 2).

REASONS FOR GRANTING THE WRIT

1. **There is a split of authority in the way the Court of Appeals for the Fifth Circuit has defined "persecution" (as used in the definition of "refugee" under the INA) and the way most (if not all) other Circuit Courts have defined the term, as these Courts have not imposed any requirement that the alien prove that he or she was punished or that he or she "possessed a belief or characteristic which a persecutor sought to overcome" as a condition of proving that "persecution" occurred.**

The current definition of "persecution" adopted by the United States Court of Appeals for the Fifth Circuit conflicts with the definition most, if not all, of the other U.S. Circuit Courts of Appeals have given the term. Unlike the Fifth Circuit, these United States Courts of Appeals have utilized a plain meaning rule analysis to define the term and have not engrafted onto the definition of "persecution" any requirement that an alien prove that his or her persecutor was motivated by a desire to "punish" him or her or that said persecutor sought to overcome a belief or characteristic held by the alien which was deemed offensive. This part of the Fifth Circuit definition, taken from dicta in the *Matter of Acosta* decision, has been disregarded by the other United States Circuit Courts in crafting their definition of the term. They have instead restricted the meaning of the term "persecution," as used in the definition of

"refugee" under § 101(a)(42) of the INA, by describing the term as a reference to extreme conduct rising to the level of physical harm, suffering, and/or threats inflicted on or directed toward an alien on account of a protected political ground. The First Circuit, for example, has stated that the term "persecution," as used in this provision of the INA, "requires that the totality of a petitioner's experiences add up to more than mere discomfiture, unpleasantness, harassment, or unfair treatment," *Nikijuluw v. Gonzales*, 427 F.3d 115, 120 (1st Cir. 2005), a "threshold [that] is not easily crossed," *Orelien v. Gonzales*, 467 F.3d 67, 71 (1st Cir. 2006).

The Second Circuit has stated that persecution "includes 'more than threats to life and freedom,'" *Chen v. INS*, 359 F.3d 121, 128 (2d Cir. 2004) and therefore encompasses a variety of forms of adverse treatment, including "non-life[-]threatening violence and physical abuse," *Chen*, 359 F.3d at 128, or non-physical forms of harm such as "the deliberate imposition of a substantial economic disadvantage," *Guan Shan Liao v. U.S. Dep't of Justice*, 293 F.3d 61, 67 (2d Cir. 2002). The Third Circuit has defined persecution as "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom." *See Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993).

The Sixth Circuit has held that "persecution," as used in the statute, "'requires more than a few isolated incidents of verbal harassment or intimidation,

unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty.'" *Gilaj v. Gonzales*, 408 F.3d 275, 284 (6th Cir. 2005).

The Seventh Circuit has defined the term as "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate." *Bace v. Ashcroft*, 352 F.3d 1133, 1137 (7th Cir. 2003).

The Eighth Circuit, in *Rife v. Ashcroft*, 374 F.3d 606, 612 (8th Cir. 2004), stated that the term "persecution" means the "infliction or threat of death, torture, or injury to one's person or freedom on account of a statutory ground (defining persecution as 'the infliction of suffering or harm upon those who differ (in race, religion, or political opinion') in a way regarded as offensive.'"

In the Ninth Circuit, the term persecution is defined as "the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (en banc).

The Tenth Circuit has adopted the same definition as the Ninth Circuit in *Chaib v. Ashcroft*, 397 F.3d 1273, 1277 (10th Cir. 2005).

The Eleventh Circuit has defined the term "persecution" as "an extreme concept, requiring more than a few isolated incidents of verbal harassment or intimidation." *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1231 (11th Cir. 2005).

Review is necessary to resolve this conflict which exists between the Fifth Circuit and the other United States Circuit Courts: The issue which must be decided is whether the meaning of the term "persecution," as used in § 101(a)(42) of the INA, is limited to one of the substantially similar "plain meaning" definitions United States Courts of Appeals other than the Fifth Circuit have adopted, to wit: extreme conduct amounting to "harm, threats, or punishment" on account of a protected ground; or whether the Fifth Circuit definition of "persecution" is the correct definition. If the Fifth Circuit definition is the correct one, the alien must not only show that he or she was harmed, punished, or threatened and subjected to extreme conduct on account of a protected ground, but prove that the extreme conduct directed toward him or her was specifically undertaken with the motive and purpose of punishment. Further, the alien must prove that the persecutor's intent and motivation by inflicting the extreme harm, suffering, or punishment was to overcome or change a belief or characteristic held by the alien.

Abdel-Latif asserts the Fifth Circuit definition of "persecution," which is based on dicta, should be struck down because it disregards the plain meaning rule and supplants and renders meaningless the "on account of" nexus test created in the INA definition of "refugee." It is this "on account of" language in the "refugee" definition which establishes the connection which must be drawn between government-sponsored "persecution" and one of the five protected grounds

listed in the statute (i.e., race, religion, nationality, and/or membership in a particular social group or political opinion) – not the connection drawn by the Fifth Circuit's definition of "persecution." The Fifth's Circuit's definition is also untenable for a third reason. Under the meaning it has given the term "persecution," any alien harmed or threatened because of a belief or characteristic related to one of the five protected grounds (to include being threatened with his or her life) would not be entitled to seek asylum or withholding of removal relief unless: (1) he or she could prove that the persecutor was motivated by a desire to punish him or her; (2) show that the persecutor's intentions were to convert or otherwise change his or her belief or a characteristic; and (3) prove that it was the overall objective of the persecutor to seek to overcome this undesirable belief or characteristic.

By holding that "[p]ersecution has been construed as requiring a showing that 'harm or suffering will be inflicted upon [the alien] in order to punish [him or her] for possession of a belief or characteristic a persecutor sought to overcome,'" (*Roy v. Ashcroft, supra*, at 138), the Fifth Circuit has imposed proof requirements on an alien who seeks to establish that he or she was "persecuted" which are not recognized by other United States Circuit Courts. These additional proof requirements will in many cases prevent an alien who would otherwise qualify for asylum or withholding of removal relief from ever qualifying for such relief. Government sponsored conduct calculated to inflict pain or suffering on a person in order to

punish him on account of the characteristic of his or her "race" is one such example. Under the Fifth Circuit's definition of "persecution," no alien harmed or forced to endure suffering because of his or her race could ever qualify for asylum or withholding of removal relief under this protected ground since "race" is an immutable characteristic which no persecutor could ever seek to change or overcome.

For this and the other above stated reasons, the Fifth Circuit's strained and unworkable definition of the term "persecution" should be struck down.

2. The Fifth Circuit's treatment of Abdel-Latif's application for relief under the Convention Against Torture as a subset of his application for withholding of removal relief conflicts with applicable decisions of other United States Courts of Appeals.

The United States Court of Appeals for the Fifth Circuit, in addressing Abdel-Latif's Convention Against Torture claim, stated: "Latif also argues that he demonstrated that it is more likely than not that, on account of his past membership in the MB [Muslim Brotherhood], he will be tortured upon his return to Egypt." It then held: "Because he has not shown that he is entitled to withholding of removal, he has not demonstrated that he can meet the higher standard for obtaining relief under the CAT." As such, the Fifth Circuit relied upon the same analysis it applied to Abdel-Latif's withholding of removal claim in concluding that Abdel-Latif failed to demonstrate his

entitlement to relief under the Convention Against Torture.

This holding by the Fifth Circuit conflicts with the decision of the United States Court of Appeals for the Ninth Circuit in *Kamalthas v. INS*, 251 F.3d 1279 (9th Cir. 2001), which specifically recognized that a claim under the Convention Against Torture is not a subset of a claim for either asylum or withholding of removal relief, but a different claim altogether. The Fifth Circuit's decision also conflicts with the Third Circuit's decision in *Zubeda v. Ashcroft*, 333 F.3d 463 (3d Cir. 2003), which adopted the same analysis as in *Kamalthas*. Both Circuit Court decisions recognize that an alien's application for relief under CAT is analytically different from an asylum or withholding or removal claim and not a subset of either type of claim. The decision of the Fifth Circuit to treat Abdel-Latif's CAT claim as a subset of his withholding of removal claim for relief thus conflicts with the well-settled law of other United States Circuit Courts, which have emphasized that an alien's application for relief under CAT should be separately and distinctly analyzed from an alien's claim for asylum or withholding of removal relief.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60623
Summary Calendar

WAEL MOHAMED ABDEL LATIF,

Petitioner,

versus

ERIC H. HOLDER, JR., U.S. Attorney General,

Respondent.

Petition for Review of an Order of
the Board of Immigration Appeals
No. A 078 524 720

(Filed July 26, 2010)

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Wael Latif, a native and citizen of Egypt, petitions for review of a decision of the Board of Immigration

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appeals ("BIA"), which affirmed a decision of the Immigration Judge ("IJ)" denying Latif's application for withholding of removal and relief under the Convention Against Torture ("CAT"). Latif argues that he demonstrated past persecution and a well-founded fear of future persecution as a result of his activities in the Muslim Brotherhood ("MB"), a government-banned political group.

Latif was detained once for a 12- to 14-hour period and was beaten during his detention. During the three-month period between his detention and his departure from Egypt, he was not bothered again. He has not associated with any MB members since his arrival in this country, and there is at least a small minority of parliamentary members in Egypt who sympathize with the MB. Additionally, at the time of the hearing, Latif's mother still lived in Alexandria, his sister in Cairo. The BIA's determination is supported by substantial evidence, and the record does not compel a contrary conclusion. *See Roy v. Ashcroft*, 389 F.3d 132, 138 (5th Cir. 2004); *Efe v. Ashcroft*, 293 F.3d 899, 906 (5th Cir. 2002); 8 C.F.R. § 208.16(b).

Latif also argues that he demonstrated that it is more likely than not that, on account of his past membership in the MB, he will be tortured upon his return to Egypt. Because he has not shown that he is entitled to withholding of removal, he has not demonstrated that he can meet the higher standard for obtaining relief under the CAT. *See Efe*, 293 F.3d at 907. The petition for review is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-60623
Summary Calendar

BIA Docket No. A078 524 720

WAEL MOHAMED ABDEL LATIF,

Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals

Before DAVIS, SMITH, and SOUTHWICK, Circuit Judges.

JUDGMENT

(Filed July 26, 2010)

This cause was considered on the petition of Wael Mohamed Abdel Latif for review of an order of the Board of Immigration Appeals and the briefs on file.

It is ordered and adjudged that the petition for review is denied.

IT IS FURTHER ORDERED that petitioner pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the
Board of
Immigration Appeals

File: A078 524 720 – El Paso, TX

Date: JUL 28 2009

In re: WAEL MOHAMED ABDEL LATIF

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Marlene Gonzalez, Esquire

ON BEHALF OF DHS:

William M. Hunt
Assistant Chief Counsel

APPLICATION: Withholding of removal; protection under the Convention Against Torture

The respondent, a native and citizen of Egypt, has filed a timely appeal of the Immigration Judge's decision issued January 15, 2008. The respondent has filed a brief on appeal, which we have considered in making a determination in this case. The Department of Homeland Security (DHS) has filed a motion for summary affirmance. The factual findings of the Immigration Judge are reviewed to determine whether they are "clearly erroneous," while all other issues in appeals from decisions of Immigration Judges, including legal and discretionary determinations and

applications of law to fact, are reviewed *de novo*. *See* 8 C.F.R. § 1003.1(d)(3) (Board's standard of review). *See also Matter of V-K-*, 24 I&N Dec. 500, 501 (BIA 2008); *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008). The appeal will be dismissed.

We find no clear error in the factual findings of the Immigration Judge in this case. *See* 8 C.F.R. § 1003.1(d)(3).[1] Upon *de novo* review of the remaining issues presented in this instance, we uphold the Immigration Judge's finding that the respondent failed to qualify for a grant of withholding of removal[2] because he failed to establish a nexus to a protected ground under the Immigration and Nationality Act.[3] *See* section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42); section 241(b)(3) of the Act, 8 U.S.C. § 1231(b)(3); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (well-founded fear standard for asylum); *INS v.* Stevic, 467 U.S. 407 (1984) ("more likely than not" standard for withholding of removal);

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[1] Contrary to the respondent's assertion of factual error on appeal, the record does *not* contain any evidence that the respondent was questioned by the SSI or any other governmental authority regarding his political opinions (Tr. at 59-63, 99-101; Exh. 2, p. 6; Respondent's Appeal Brief, at 12-13).

[2] The Immigration Judge correctly pretermitted the respondent's application for asylum as having been untimely filed (I.J. at 5), and the respondent has not contested that finding on appeal. *See* 8 C.F.R. § 1208.4(a).

[3] The respondent's application for asylum and withholding of removal (Form I-589) was initially filed after May 11, 2005, and is therefore governed by the provisions of the REAL ID Act. *See Matter of S-B-*, 24 I&N Dec. 42 (BIA 2006).

Matter of J-B- & S-, 24 I&N Dec. 208 (BIA 2007) (protected ground must be "at least one central reason" for asylum claims governed by REAL ID Act). Here, the respondent was mistreated by SSI security agents who were seeking information regarding leaders of the Muslim Brotherhood who had held a demonstration on the college campus where the respondent attended university and in which the respondent had participated (I.J. at 2-3, 5-8). On appeal, the respondent asserts that he was targeted by SSI agents on account of his "membership in a political organization," the Muslim Brotherhood, and that the agents inferred that he should stop his activities in that organization (Respondent's Appeal Brief, at 12-13). However, we find that the Immigration Judge correctly concluded that the mistreatment occurred within the context of the agents' investigation attempting to obtain information about the leaders of the campus demonstration (I.J. at 2-3, 5-6). *See Matter of R-*, 20 I&N Dec. 621 (BIA 1992) (the mistreatment of a Sikh in Punjab by Indian police in the course of an investigation did not establish eligibility for asylum or withholding where the purpose of the mistreatment was to obtain information about Sikh militants who sought the violent overthrow of the Indian Government, rather than to punish him because of his political opinions or merely because he was a Sikh). *See Matter of R-*, *supra*, at 621-25. We also affirm the Immigration Judge's alternative finding that the respondent's single detention of 14 hours did not rise to the level of persecution (I.J. at 7-8).

The Immigration Judge also correctly denied protection under the Convention Against Torture, where the respondent failed to establish that he would more likely than not face torture by or with the acquiescence (to include the concept of willful blindness) of a member of the government of Egypt upon return to Egypt (I.J. at 8-11). *See* 8 C.F.R. §§ 1208.16-.18. Although the respondent argues on appeal that he was threatened with torture during his arrest and detention in 1996, he has failed to establish that Egyptian authorities would more likely than not torture him if he were returned to Egypt today (I.J. at 8-11). *Id. See also Matter of V-K-, supra*; *Matter of A-S-B-, supra*.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ Ray D. Paul
FOR THE BOARD